Univein Sdn Bhd v Malaysia Building Society Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-127 OF 2002
DENIS ONG, ALAUDDIN AND ABDUL AZIZ JJCA
17 APRIL 2003

Civil Procedure *— Execution — Stay — Whether application for stay of execution pending appeal allowed — Whether appeal rendered nugatory if stay order refused — Whether respondents deprived financially if order for stay granted*

This was the appellant company's application for stay of execution pending appeal of an order for sale of three lots of land belonging to them that they had charged to the respondent company as security for loans provided by the latter to them. The appellants contended that the order for stay was necessary as it would otherwise render the appeal nugatory whereby the land would be sold and any rights involved would be lost forever. Further, if the land were sold, it would be of a lower price based on the present market value due to the Asian economic crisis. The issues for determination were: (i) whether the application for stay pending appeal should be allowed; (ii) whether if the order for stay was refused, it would render the appeal nugatory; and (iii) whether if the order for stay was granted, it would deprive the respondents financially.

Held, dismissing the appellants' application for stay of execution:

(1) The appellants would not mind losing the lands if they got the right price for them. The lands were commercial property of no sentimental value to the appellants. That being the case, to the point of nugatoriness and any submission about it did not have to be considered (see p 622D–E).

(2) The balance tilted heavily in favour of allowing the sale to proceed. If the lands were not sold now, but sold only after the disposal of the appeal should the appellants fail in the appeal, with interest accruing daily at more than RM20,000 per day, the total outstanding would keep increasing to an amount that would depend on when the appeal would be decided. The proceeds of sale of the lands would not pay even half of what the outstanding amount would be then. The respondents should not be deprived of the fruit of their litigation. They should be allowed to recover now whatever amount they could from the lands. Apart from enabling them to enjoy some fruit from their litigation, that would reduce the amount of the interest that would otherwise keep accruing (see p 622F–I).

(3) If the lands were sold now and the appellants should succeed in the appeal, any loss that they might sustain from the sale of their lands could be compensated for by the respondents with damages based on the commercial value of the lands. There was no question that the respondents would not be able to pay the

damages. Thus, there wa no justification for a stay of execution and the application had to be dismissed (see p 623A–B).

[**Bahasa Malaysia summary**

Ini adalah permohonan perayu syarikat untuk penggantungan pelaksanaan sementara menunggu rayuan untuk satu perintah jualan tiga lot tanah yang dimiliki oleh mereka yang telah dicagarkan oleh mereka kepada responden syarikat sebagai jaminan untuk pinjaman yang diberikan kepada mereka oleh responden. Perayu-perayu menegaskan bahawa perintah penggantungan adalah perlu kerana jika tidak diberikan akan mengakibatkan rayuan tersebut tidak berguna kerana tanah tersebut akan dijual dan apa-apa hak ke atasnya akan lenyap. Tambahan pula, jika tanah tersebut dijual, ia adalah pada harga yang lebih rendah berdasarkan nilai pasaran semasa berdasarkan krisis ekonomi Asia. Persoalan-persoalan untuk ditentukan adalah: (i) sama ada permohonan untuk penggantungan sementara menunggu rayuan patut dibenarkan; (ii) sama ada jika perintah penggantungan ditolak, ia akan mengakibatkan rayuan tersebut tidak berguna; dan (iii) sama ada jika perintah untuk penggantungan dibenarkan, ia akan menyebabkan responden-responden terkilan dari segi kewangan.

Diputuskan, menolak permohonan perayu untuk penggantungan:

(1) Perayu-perayu tidak kisah kehilangan tanah-tanah mereka jika mendapat harga yang sesuai untuk tanah-tanah tersebut. Tanah-tanah tersebut merupakan hartanah komersial yang tiada nilai sentimental kepada perayu-perayu. Jika begitu, berhubung perkara tentang ketidakbergunaan dan apa-apa hujah tentangnya tidak perlu dipertimbangkan (lihat ms 622D–E).

(2) Imbangan lebih berat kepada membenarkan jualan tersebut diteruskan. Sekiranya tanah-tanah tersebut tidak dijual sekarang, tetapi dijual hanay selepas rayuan selesai jika perayu-perayu gagal dalam rayuan tersebut, dengan faedah yang meningkat setiap hari lebih daripada RM20,000 sehari, baki jumlah akan semakin meningkat kepada satu jumlah yang bergantung kepada bila rayuan tersebut akan diputuskan. Hasil jualan tanah-tanah tersebut tidak akan dapat membayar separuh daripada baki jumlah kelak. Responden-responden tidak sepatutnya terkilan mendapat hasil daripada litigasi mereka. Mereka sepatutnya dibenarkan menuntut sekarang apa-apa jumlah yang mereka boleh daripada tanah-tanah tersebut. Selain daripada membolehkan mereka menikmati hasil daripada litigasi mereka, ia akan mengurangkan jumlah faedah yang sebaliknya akan semakin bertambah (lihat ms 622F–I).

(3) Sekiranya tanah-tanah tersebut dijual sekarang dan perayu-perayu berjaya dalam rayuan tersebut, apa-apa kerugian yang mungkin dialami oleh mereka daripada jualan tanah-tanah mereka boleh diberi pampasan oleh responden-responden dengan ganti rugi berdasarkan nilai komersial tanah-tanah tersebut. Tiada persoalan bahawa responden-responden tidak mampu membayar ganti rugi tersebut. Oleh itu, tiada justifikasi untuk satu penggantungan pelaksanaan dan permohonan tersebut hendaklah ditolak (lihat ms 623A–B).]

Notes

For cases on stay of execution, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2355–2387.

Cases referred to

See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors [1995] 3 MLJ 598 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 44, 73
National Land Code s 256

Appeal from: Originating Summons No MT4–24–808 of 1997 (High Court, Shah Alam)

Teh Meng Teck (*Richard WG Lee* and. *Loke Pooi Gee* with him) (*Cheah Teh & Su*) for the appellants.

Wong Kian Kheong (*Cheah Soo Chuan* and *Karen Lee Foong Voon* with him (*Lee Hishammuddin*) for the respondents.

Abdul Aziz JCA (delivering judgment of the court): The appellant company, having been refused it by the High Court at Shah Alam on 2 December 2002, applied to this court for a stay of execution, pending appeal, of an order given on 7 January 2002 by that High Court for the sale under s 256 of the National Land Code of three lots of land belonging to them that they had charged to the respondent company as security for loans provided by the respondent company to them. The appeal that is pending is the appellant company's appeal to this court from the order of sale of 7 January 2002.

It was noted that according to the title to the notice of motion by which the application for stay of execution was made to this court, the application was made under s 44 of the Courts of Judicature Act 1964. That section confers general powers on a single judge of this court to make, in any proceedings pending before this court, incidental directions and interim orders and orders concerning security for costs. In the submissions before

A us on the stay application, there was some argument as to whether the appropriate section should be ss 44 or 73, which is specifically about stay of execution pending appeal to this court.

The argument involved references to the observations of this court about s 44 in *See Teow Guan & Ors v Kian Joo Holdings Sdn Bhd & Ors* [1995] 3 MLJ 598 and had, as its ultimate focus, the question of what an applicant for a stay of execution has to show. But judging the appellants' stay application by the manner in which they sought to justify it in their affidavit, as will be seen after this, to my mind it would not have made any difference to its outcome whether it was an application under ss 44 or 73.

C The statutory sale by public auction had been fixed for 19 February 2003. We heard the stay application on 18 February 2003 and on the same day we dismissed it. These are my grounds for deciding that the application ought to be dismissed.

A few salient facts need first to be set out.

D The loans were disbursed in 1995. The total sum disbursed was RM25,800,000. Because the appellants defaulted in the payment of accrued interest amounting to RM3,512,265.79 as at 31 January 1997, in October 1997 the respondents declared that the principal, interest and all other sums payable under the loan agreement were forthwith due and payable. On 1 February 2003, 17 days before we dismissed the appellants' E stay application, the outstanding amount that they owed the respondents was RM71,440,223.50. That amount would keep increasing with the accrual of interest from day to day by an amount of more than RM20,000 a day.

According to a valuation report obtained by the respondents, the three F lands that the respondents held as security, which are located in the vicinity of the Kuala Lumpur City Centre, had a market value of RM27,680,000 as at 15 February 2002. That value was adopted by the appellants' counsel in submission.

In para 15 of their affidavit in support of their application, the appellants claimed that there were special circumstances justifying the grant G of a stay of execution. What the appellants meant the special circumstances to be were set out in paras 14, 16 and 18 of their affidavit. In para 14, the appellants said to the effect that if stay was not granted and the lands were sold, their appeal would be rendered nugatory or academic even if they finally succeeded in getting the order for sale set aside, and they gave their H reason for saying so in para 16, where they said to the effect that if there was no stay, the lands would be auctioned off and they would lose their rights in them for ever. The point about losing the lands appeared again in para 20 where they argued that the balance of convenience was in favour of granting a stay so that their interest in the lands would be preserved until final disposal of the appeal. It was a point of nugatoriness of appeal.

I In para 18, the appellants presented another point as to special circumstances, which was inconsistent with the nugatoriness point. They said to the effect that if the lands were sold presently, in view of the

economic downturn brought about by the Asian economic crisis the lands would fetch a much lower price than their actual market value. It was a fear of financial loss. It was a point of dollars and cents.

A matter disclosed by the appellants' counsel before their other counsel entered upon his actual substantive submission on their stay application on 18 February 2003 convinced me that the point of nugatoriness of appeal was not at all the concern of the appellants and that their real concern was as to dollars and cents, which concern they expressed in para 18 of their affidavit. What counsel informed the court was that someone had made a formal offer to buy the lands by private treaty for RM30,500,000, which counsel said was RM4m more than the reserve price for the auction, and that the offer had been communicated by the appellants' solicitors to the respondents' solicitors on 14 February but that a few minutes ago he had been informed by the respondents' solicitors that the respondents' instructions were to proceed with the auction that had been fixed for the next day, 19 February. The appellants' other counsel thereupon embarked on his submission for a stay of execution.

It was not clear to me why the appellants' counsel made the disclosure. The matter disclosed certainly did not enter into the substantive submission on stay of execution. It was, however, obvious to me from the disclosure that the appellants would not mind losing the lands if they got the right price for them. The respondents had therefore been right in saying in para 17 of their affidavit in reply that the lands were commercial property of no sentimental value to the appellants.

That being the case, to my mind the point of nugatoriness and any submission about it did not have to be considered.

That left to be considered only the question of dollars and cents from the point of view of what the appellants' counsel called balance of convenience and the respondents' counsel called balance of justice. It was obvious to me that the balance tilted heavily in favour of allowing the sale to proceed. From RM25,800,000 in 1995, the debt had now mounted to RM71,440,223.50. If the lands were not sold now, but sold only after the disposal of the appeal should the appellants fail in the appeal, with interest accruing daily at more than RM20,000 per day, the total outstanding would keep increasing to an amount that would depend on when the appeal would be decided. At RM20,000 per day, interest per year would come to a region of RM7m. The proceeds of sale of the lands would not pay even half of what the outstanding amount would be then. It would be worse if, depending on the economic situation then, the lands should fetch a lower value than their present market value. As to the balance, the respondents might not be able to recover it at all. The respondents should not be deprived of the fruit of their litigation. They should be allowed to recover now whatever amount they could from the lands. Apart from enabling them to enjoy some fruit from their litigation, that would reduce the amount of the interest that would otherwise keep accruing.

A On the other hand, if the lands were sold now and the appellants should succeed in the appeal, any loss that they might sustain from the sale of their lands could be compensated for by the respondents with damages based on the commercial value of the lands. There was no question that the respondents would not be able to pay the damages.

B For those reasons, I saw no justification for a stay of execution and the application had to be dismissed.

My learned brothers, Denis Ong and Alauddin JJCA, have had an opportunity of reading these grounds in draft and have expressed their concurrence with it.

C *Appellant's application for stay of execution dismissed.*

Reported by Ezatul Zuria Azhari

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